

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY - 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the Cable Television
Consumer Protection and Competition
Act of 1992

MM Docket No. 92-259

Broadcast Signal Carriage Issues
Reexamination of the Effective
Competition Standard for the
Regulation of Cable Television
Basic Service Rates

MM Docket No. 90-4

Request by TV 14, Inc.
to Amend Section 76.51 of the
Commission's Rules to Include
Rome, Georgia, in the Atlanta,
Georgia, Television Market

MM Docket No. 92-295
RM-8016

To: The Commission

PETITION FOR RECONSIDERATION

James L. Winston, Esq.
Walter E. Diercks, Esq.
RUBIN, WINSTON, DIERCKS,
HARRIS & COOKE
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036
(202) 861-0870

May 3, 1993

No. of Copies
1346052

CA 10

TABLE OF CONTENTS

Summary.....	ii
I. The Commission's Report And Order.....	2
II. The Commission's Decision Is Contrary To The Express Language Of The Cable Act.....	3
III. The Commission's Decision Is Not Supported By Record Evidence As Required By The Cable Act.....	7
IV. The Commission May By Rulemaking Redefine The Salinas-Monterey ADI To Include Santa Clara County.....	10
V. The Commission Deprived Cypress Of Its Due Process Rights By Failing To Give Notice That It Might Adopt The Home County Exception.....	11
VI. The Commission's Decision Is Contrary To The Public Interest Because It Will Further Distort The Unfair Competitive Advantage Which KNTV Has In the Salinas-Monterey Market.....	13
VII. Conclusion.....	18

SUMMARY

Cypress Broadcasting, Inc., licensee of television station KCBA, licensed to Salinas, California, requests reconsideration and reversal of the Commission's decision in this proceeding to the extent the Commission's decision accorded must-carry rights to stations in the home county in which their city of license is located. Cypress seeks reconsideration and reversal for the following reasons.

The Commission's decision is in direct violation of the Cable Act in that it purports to accord KNTV, licensed to San Jose, California, and similarly situated stations, must-carry rights in an entire "county" outside of their Arbitron designated ADI. The Cable Act limits the Commission's ability to accord stations must carry-rights only to additional "communities" outside of their ADIs.

Further, while the Cable Act does allow the Commission to accord stations must-carry rights in additional communities outside of their markets, the Cable Act requires that such Commission action must be based upon a full factual record, the requirements of which are specifically set forth in the Cable Act. The Commission had no such record evidence to support its decision to afford KNTV must-carry rights outside of its ADI.

While the Cable Act precludes the Commission from adding

Commission from initiating a rulemaking proceeding to add a county to the definition of a market.

In addition to being contrary to the Cable Act, the Commission's decision also violates the requirements of procedural due process in that Cypress and the general public were never given notice that the Commission might adopt the home county exception to the must-carry rules and were not given an opportunity to be heard on that exception.

The Commission's decision also is contrary to the public interest in that it exacerbates an existing imbalance in market power in the Salinas-Monterey market.

The Commission's decision will make this competitive imbalance even more pronounced by allowing KNTV must-carry rights in both the Salinas-Monterey market and a significant portion of the San Francisco-Oakland-San Jose market. The public interest would not be served by subjecting the small market stations in Salinas-Monterey to the additional market power which was given to KNTV in the Commission's decision.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAY - 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of the Cable Television)	MM Docket No. 92-259
Consumer Protection and Competition)	
Act of 1992)	
)	
Broadcast Signal Carriage Issues)	
Reexamination of the Effective)	
Competition Standard for the)	MM Docket No. 90-4
Regulation of Cable Television)	
Basic Service Rates)	
)	
Request by TV 14, Inc.)	
to Amend Section 76.51 of the)	MM Docket No. 92-295
Commission's Rules to Include)	RM-8016
Rome, Georgia, in the Atlanta,)	
Georgia, Television Market)	

To: The Commission

PETITION FOR RECONSIDERATION

Cypress Broadcasting, Inc. ("Cypress"), licensee of television station KCBA, Channel 35, licensed to Salinas, California, hereby petitions for reconsideration of the Commission's Report and Order in the above-captioned proceeding. Specifically, Cypress requests reconsideration of that portion of the Commission's Report and Order which ruled that a television station will be considered a must-carry station in its home county, even if that station is assigned to an ADI different from that of its home county. Report and Order, MM Docket No. 92-259 et. al., FCC-144, released March 29, 1993 at para. 39.

Cypress seeks reconsideration of the Commission's decision on the grounds that the decision is contrary to the express

requirements of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"). In addition, the Commission failed to give adequate notice that it might adopt this exception to the statutorily required must-carry rules. Cypress also seeks reconsideration because the Commission's decision is not in the public interest in that it will provide KNTV, a San Jose television station, an increase in its already unfair competitive advantage over Salinas-Monterey stations.

In support of its Petition, Cypress submits the following:

I. THE COMMISSION'S REPORT AND ORDER

1. In its Report and Order, the Commission adopted rules to implement a portion of the Cable Act. Specifically, the Commission's Report and Order adopted rules implementing the Cable Act's broadcast signal carriage and retransmission consent rules. Among the Comments considered by the Commission in this proceeding were Comments filed by Granite Broadcasting Corporation ("Granite") on behalf of its television station, KNTV, Channel 11, an ABC affiliate licensed to San Jose, California. In its Comments, Granite correctly stated that KNTV is licensed to San Jose and that San Jose is part of the San Francisco-Oakland-San Jose Arbitron ADI. Granite Comments dated January 4, 1993 at 8-9. Granite added that Arbitron lists KNTV as a part of the Salinas-Monterey ADI. Granite Comments at 9. Granite then asserted that, because KNTV is listed by Arbitron as being in the Salinas-Monterey ADI, KNTV should receive special treatment under the cable must-carry

regulations adopted by the FCC in the above-captioned Report and Order. Granite Comments at 9.

2. Based upon this situation described by Granite, the Commission ruled in its Report and Order that:

[E]ach television station will be considered local in those counties listed in the same ADI to which it is assigned. We will make one exception, however: Each station also will be considered a must-carry station in its home county, even if that station is assigned to an ADI different from that of its home county.

Report and Order at para. 39 (emphasis added).

3. The Commission added in a footnote that:

We note the case of KNTV, San Jose, which is assigned to the Salinas-Monterey ADI, even though its home county, Santa Clara, is considered part of the San Francisco ADI.

Id. at para. 39, n. 108.

4. As Cypress shall explain below, the Commission's decision to accord KNTV this special treatment is not permitted under the Cable Act, denied Cypress notice and an opportunity to be heard and is not in the public interest.

II. THE COMMISSION'S DECISION IS CONTRARY TO THE EXPRESS LANGUAGE OF THE CABLE ACT

5. The Cable Act sets forth very specific requirements with respect to the must-carry rights which the Commission is to accord television stations. At Section 614(a) the Cable Act provides:

Each cable operator shall carry on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.

47 U.S.C. Section 614(a).

6. At Section 614(h)(1)(A), the Cable Act defines "local commercial television station" as follows:

In General -- For purposes of this section, the term "local commercial television station" means any full power television broadcast station,... licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

47 U.S.C. Section 614(h)(1)(A).

7. The Cable Act in Section 614(h)(1)(C)(i) specifies exactly how a station's television market is to be determined:

For purposes of this section, a broadcast station's market shall be determined in the manner provided for in Section 73.3555(d)(3)(i) of title 47, Code of Federal Regulations, as in effect on May 1, 1991....

47 U.S.C. Section 614(h)(1)(C)(i).

8. As the Commission explains in its Report and Order, Section 73.3555(d)(3)(i) has been renumbered as Section 73.3555(e)(3)(i). Report and Order at para. 37, n.100. Section 73.3555(e)(3)(1) of the Commission's Rules defines a broadcasting station's market as its Arbitron ADI. As recognized by Granite and the Commission, KNTV is treated by Arbitron as being a part of the Salinas-Monterey ADI. Therefore, under the clear language of the Cable Act, KNTV was accorded no must-carry rights in any location outside of the Salinas-Monterey ADI.

9. However, the Cable Act accounted for the possibility that there may be situations where a particular station may be able to demonstrate that it should be accorded must-carry rights outside of its ADI. For such unique situations the Cable Act provides the following exclusive remedy:

[F]ollowing a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

47 U.S.C. Section 614 (h)(1)(c)(i) (emphasis added).

10. The Cable Act therefore clearly limits the Commission's ability to grant a station must-carry rights outside of its ADI.

12. Section 76.54(a) clearly contemplates that a "community" and a "county" are distinct entities for purposes of the Commission's cable television rules. This distinction goes back at least to the adoption of the Commission's significantly viewed rules. See Cable Television Report and Order, 36 FCC 2d 143, 24 RR 2d 1501 (1972). On several occasions since 1972 the Commission has had occasion to explain its reasons for distinguishing between "counties" and "communities" for purposes of implementing its significantly viewed rules. In Desert Empire Television Corp, 7 FCC Rcd 4214, 71 RR2d 147 (M.M.B. 1992), the Commission commented on its distinction between "communities" and "counties":

In 1972, in adopting comprehensive cable television rules, the Commission established a nationwide list of significantly viewed signals.... While the list was based upon county-wide data the Commission recognized the inherent inadequacies of such data, but determined that the need 'to provide a base of signals' and for 'cable to ~~get~~ provide ~~warrented~~ the use of such data at that

14. Thus, the Commission exceeded its statutory authority under the Cable Act by adopting a rule exception which gives must-

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

47 U.S.C. Section 614(h)(1)(C)(ii).

17. Prior to issuing its Report and Order in this proceeding, the Commission had received no request from Granite, which complied with these four statutory requirements. Granite's Comments failed to address the following specific issues:

18. First, Granite failed to address whether other stations located in the same area have been historically carried on the cable system or systems within the affected community. Section 614(h)(1)(C)(ii)(I). Had Granite presented evidence on this matter it would have been obligated to advise the Commission that other stations in the Salinas-Monterey ADI -- those stations licensed to Salinas and Monterey -- are not carried on most of the cable systems outside of its ADI on which KNTV seeks to be carried. Thus, it is clear that KNTV is seeking to gain a carriage advantage over the other stations in the ADI. This is matter on which the statute requires each individual requesting station to provide specific evidence and on which KNTV has presented no evidence. Thus, the Commission had no evidence upon which to make the statutorily required finding.

19. Second, the Cable Act requires Granite to present evidence on whether any other station, that is eligible to be carried by a cable system in the affected community as a must-carry signal, provides "news coverage of issues of concern to the affected community or provides carriage or coverage of sporting and other events of interest to the affected community." Section 614(h)(1)(C)(ii)(II). Again, Granite presented no such evidence, and the Commission had no record upon which it could make the finding the Cable Act requires.

20. Third, the Cable Act requires Granite to present "evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community." Section 614(h)(1)(C)(ii)(IV). The Cable Act does not specify precisely the information the Commission must require to meet the evidentiary burden imposed by Section 614(h)(1)(C)(ii)(IV). However, the Commission already has in place procedures with which stations must comply in order to demonstrate that they are significantly viewed in a community. Section 76.54 of the Commission's Rules sets forth the information to be provided and the methodology to be used in providing such a study. Granite has not presented the information and studies required by Section 76.54, and the Commission has not specified that any other procedure is permissible as a means for meeting the requirements of the Cable Act. Given the similarities between the relief sought here by Granite and the relief sought by parties utilizing the Commission's significantly viewed rules, a showing similar to that

called for by those rules would appear to be appropriate for providing the Commission the evidence required by the Cable Act. Thus, Granite's showing on this point is particularly inadequate, and the Commission once again has no evidence to support the finding required by the Act.

IV. THE COMMISSION MAY BY RULEMAKING REDEFINE THE SALINAS-MONTEREY ADI TO INCLUDE SANTA CLARA COUNTY

21. As noted above, in reconsidering its decision to accord stations must-carry rights in communities outside of their ADIs.

Commission to revise the list in Section 76.51 as required to implement the provisions of the Cable Act. 47 U.S.C. Section 614(f). By utilizing its existing rulemaking procedures to add Santa Clara County to the Salinas-Monterey ADI, the Commission will accord must-carry rights to all stations in the market in the new county. This will avoid the competitive imbalance the Commission's action in this proceeding would create if it is not reconsidered and reversed.

V. THE COMMISSION DEPRIVED CYPRESS OF ITS DUE PROCESS RIGHTS BY FAILING TO GIVE NOTICE THAT IT MIGHT ADOPT THE HOME COUNTY EXCEPTION

23. An additional ground requiring the reconsideration and reversal of the home county exception to the must-carry rule is that the Commission gave no notice that it might adopt such a home county exception. When the Commission issued its Notice of Proposed Rulemaking ("NPRM") in this proceeding, it stated the following with respect to the options it was considering with respect to possible additions or subtractions of "communities" in the designation of markets for purposes of the must-carry rules:

To better reflect market realities and effectuate the purposes of this Act, Section 614(h)(1)(C) permits the Commission to add communities to or subtract communities

under the provisions of Section 76.7, procedures for petitions for special relief, rather than the rulemaking procedures set forth in Part 1, Subpart C. We believe that consideration of such requests could be expedited if they were filed as petitions for special relief. Would this process be adequate to afford all interested parties sufficient notice? We request comment on this proposal.

8 FCC Rcd 8055, 8059 (emphasis added).

24. Indeed, the Commission went on at length to discuss what information parties filing requests for addition or subtraction of communities might be required to submit:

The 1992 Act specifies that, when considering such requests, the Commission shall afford particular attention to the value of localism by taking into account

constructive or actual notice of the Commission's intent to adopt the home county rule exception. This failure of notice is an additional ground requiring reconsideration of the Commission's decision. This failure to give notice is not just of theoretical importance. Cypress, as the licensee of a station in the Salinas-Monterey ADI, has suffered a direct competitive disadvantage as a result of the Commission's surprise action benefiting KNTV.

VI. THE COMMISSION'S DECISION IS CONTRARY TO THE PUBLIC INTEREST BECAUSE IT WILL FURTHER DISTORT THE UNFAIR COMPETITIVE ADVANTAGE WHICH KNTV HAS IN THE SALINAS-MONTEREY MARKET

26. To understand the implications of its action and why this action is not in the public interest, the Commission must understand some of the history of the Salinas-Monterey market and the ongoing disadvantage to which stations licensed to this market have been subjected as a result of encroachment from a station in the San Francisco-Oakland-San Jose market. The following stations are licensed to Salinas and/or Monterey:

KCBA, Channel 35
KMST, Channel 46
KSBW, Channel 8
KSMS, Channel 67

The following stations are licensed to San Jose:

KNTV, Channel 11
KICU, Channel 36
KSTC, Channel 48
KLXV, Channel 65

27. Although KNTV is licensed to San Jose, Arbitron treats KNTV as a station in the Salinas-Monterey ADI. The San Francisco-Oakland-San Jose market is ranked 5th in size by Arbitron while the

May 10, 1974. In the Territorial Exclusivity Order, the Commission did not grant a request by KNTV that Section 73.685(m) be written so as to exclude San Jose from the hyphenated market provision, i.e., the Commission rejected KNTV's argument that television stations licensed to San Francisco and Oakland should not be able to enforce non-network programming exclusivity against television stations licensed to San Jose. In Re Territorial Exclusivity in Non-network TV Programming, 46 FCC 2d 892, 29 RR 2d 1748, 1753, 1758 (1974), see also Ralph C. Wilson Industries, Inc., 91 FCC 2d 127, 52 RR 2d 253 (1982).

30. Thereafter, KNTV immediately started a stream of legal proceedings involving the application of Section 73.685(m) to KNTV. On December 20, 1974, Gill Industries, Inc., the then-licensee of KNTV, filed a "Request for Interpretive Ruling" with the Commission seeking a waiver of the hyphenated market provisions of Section 73.685(m). In its Request, Gill asserted that it had made a showing justifying a waiver of the hyphenated market provisions of Section 73.685(m). The Commission denied Gill's request for a waiver of Section 73.685(m) for KNTV. Geographical Exclusivity In Non-Network Syndicated Programming, 37 RR 2d 695 (1976).

31. This rejection by the Commission spawned a "Petition for Reconsideration" filed by Gill on July 19, 1976. The Commission denied this Petition in March, 1977. Geographical Exclusivity in Non-Network Syndicated Programming, 40 RR 2d 473 (1977). On November 1, 1977, shortly after the Commission rejected Gill's petition for reconsideration, Gill filed a petition to deny the

license renewal application for KGO(TV) which was and is licensed to San Francisco. Gill based its petition to deny on KGO's inclusion of KNTV within its syndicated programming exclusivity agreements with program suppliers, while KGO was not exercising non-network programming exclusivity against KSBW (licensed to Monterey). American Broadcasting Cos., Inc., 46 RR 2d 1695 (1980).¹

22. The Commission denied the petition to deny but indicated

was released. See Ralph C. Wilson Industries, Inc., supra 52 RR 2d at 254.

33. As a result of KNTV's success in this regard, KICU, a station licensed to San Francisco-Oakland, soon began a similar campaign to be treated as a Salinas-Monterey station for territorial programming exclusivity purposes. Thus far KICU's efforts have proven unsuccessful. Ralph C. Wilson Industries, Inc., supra.

34. The pivotal point in the above-described history was the Commission's decision indicating to the other San Francisco-Oakland-San Jose market television stations that the Commission perceived some merit in KNTV's claim that the other stations in that market should not exercise their territorial exclusivity rights against KNTV. It is that determination that is now subjecting KCBA and other Salinas-Monterey television stations to competition for programming from KNTV, a station that in all other respects, except ADI designation, is a San Francisco-Oakland-San Jose market station.

35. Against this backdrop, the Commission's decision to accord KNTV must-carry rights in both the entire Salinas-Monterey market and a significant part of the San Francisco-Oakland-San Jose market will greatly exacerbate an already unfairly tilted competitive situation in the Salinas-Monterey market. For this reason, the Commission's decision is not in the public interest and should be reconsidered.

VII. CONCLUSION

36. Reconsideration is required because the Commission's decision fails to comply with the Cable Act. The Cable Act only permits the Commission to add "communities," not "counties," to its market definitions at the request of a specific station. In addition, the Cable Act specifies the procedures which must be

Monterey ADI, with the result benefiting all stations in the Salinas-Monterey ADI.

39. Further, the Commission's decision to extend must-carry rights to KNTV deserves the public interest by providing an even greater competitive advantage to KNTV, a station licensed to San Jose, a community in the 5th Arbitron ADI. As a direct result of the Commission's decision, KNTV will be able to exercise market power to the disadvantage of stations licensed to Salinas-Monterey, the 11th Arbitron ADI. On the other hand, there are important public interest reasons for limiting the market power of this San Jose station from further disadvantaging KCBA and the other stations licensed to the small Salinas-Monterey ADI. By reconsidering and reversing its decision, the Commission will prevent further competitive distortions in the Salinas-Monterey market.

WHEREFORE, Cypress requests that the Commission reconsider and reverse its decision to provide a home county exception to the must-carry rules adopted in this proceeding.

Respectfully submitted,

CYPRESS BROADCASTING COMPANY

By: _____


James L. Winston, Esq.
Walter E. Diercks, Esq.
Rubin, Winston, Diercks,
Harris & Cooke
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036
(202) 861-0870

May 3, 1993

CERTIFICATE OF SERVICE

I, Kathy Nickens, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, do hereby certify that a copy of the foregoing "PETITION FOR RECONSIDERATION" was served this 3rd day of May, 1993, by first-class postage mail to the following:

Tom W. Davidson
Paul S. Pien
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue, N.W.
Suite 400
Washington, D.C. 20036
Counsel for Granite Broadcasting
Corporation



Kathy Nickens